BEFORE THE APPEALS BOARD FOR THE KANSAS DIVISION OF WORKERS COMPENSATION

GARY R. PELSOR JR.)
Claimant)
)
VS.)
)
ALLIED CONSTRUCTION SRVS., INC.)
Respondent) Docket No. 1,035,692
AND)
)
EMPLOYERS MUTUAL CASUALTY CO.)
Insurance Carrier)

ORDER

Respondent and its insurance carrier request review of the October 9, 2007 preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict.

ISSUES

At the October 3, 2007 preliminary hearing, claimant requested medical treatment with Dr. Kurt Knappenberger as well as temporary total disability benefits beginning July 17, 2007. Respondent denied claimant suffered accidental injury arising out of and in the course of employment.

After the preliminary hearing, the Administrative Law Judge (ALJ) entered an Order which designated Dr. Knappenberger to treat claimant's right knee and ordered respondent to pay temporary total disability benefits commencing August 13, 2007. The ALJ made no factual findings, nor any analysis of the issues. K.S.A. 44-534a(2) provides that upon a preliminary finding that a claim is compensable an ALJ may make a preliminary award of medical compensation. Consequently, it is implicit in the ALJ's order designating a treating physician that the underlying compensability issue of injury arising out of and in the course of employment was determined in claimant's favor.

The respondent requests review of whether claimant's accidental injury arose out of and in the course of employment.

Claimant requests the Board to affirm the ALJ's Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant began working in May 2007 as a drywall finisher for respondent. His job consisted of mudding, taping and finishing drywall. On July 11, 2007, he had climbed the side of a scaffold and had put his right foot on the platform. He then lifted his left leg up over the rail and while turning twisted his right knee. Claimant immediately felt a dull pain in his right knee and it continued to worsen as he worked. Respondent laid claimant off work on July 16, 2007. Claimant did not immediately report the injury to his employer because he thought the pain was going to be minor and go away as well as the fear of losing his job. Claimant testified:

Q. Why didn't you report that to anyone?

A. I thought the pain was going to be minor and that it would go away, and the fact that I was making over \$27 an hour and it was the only big job going on in Kansas City and there were people lined up waiting for it, and I wasn't getting along with the foreman anyway because of an accident that had happened with another crew member that was partnered up with me. I was fearful of losing my job and I didn't want to rock the boat.¹

After claimant was laid off he tried to call Ron Fridley, respondent's field superintendent, to report his injury and left messages for him to return his call but no response was received. At the request of the ALJ, the claimant submitted a copy of his phone billing which corroborated his testimony that he had made the calls.

Because the claimant did not provide notice until after he was laid off the respondent argues the accident did not occur. This Board member disagrees. The claimant provided uncontradicted testimony regarding how the accidental injury occurred and a plausible explanation why he did not immediately report the incident. He further testified that he tried to contact the field superintendent to report his accident immediately after he was laid off and was no longer fearful of termination. Claimant's phone records confirmed the calls were made. The claimant has met his burden of proof to establish that he suffered accidental injury arising out of and in the course of his employment.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.² Moreover, this review of a preliminary hearing Order has been determined by only one Board Member,

¹ P.H. Trans. at 17-18.

² K.S.A. 44-534a.

as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.³

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Bryce D. Benedict dated October 9, 2007, is affirmed.

IT IS SO ORDERED.	
Dated this day of December 2	2007.
	DAVID A. SHUFELT BOARD MEMBER

George H. Pearson, Attorney for Claimant
 Donald J. Fritschie, Attorney for Respondent and its Insurance Carrier
 Bryce D. Benedict, Administrative Law Judge

³ K.S.A. 2006 Supp. 44-555c(k).